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Published in:
Edinburgh Law Review

DOI:
[10.3366/elr.2014.0188](https://doi.org/10.3366/elr.2014.0188)

Publication date:
2014

Document Version
Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Scullion, D. (2014). The Courts Reform Bill and a Case Involving a Bike. *Edinburgh Law Review*, 18(1), 146-149.
<https://doi.org/10.3366/elr.2014.0188>

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The Courts Reform Bill and a Case Involving a Bike

The Scottish Government is therefore supportive of the [Scottish Civil Courts Review's ("SCCR")] recommendation for a new third tier within the sheriff court. It reflects one of the SCCR's principles, that cases should be allocated proportionately within the system: freeing up sheriffs to hear more complex civil cases, and solemn crime."¹

The draft Courts Reform (Scotland) Bill proposes radical changes to Scotland's civil justice system.² The proposals include the creation of a new type of judge, the summary sheriff. As well as hearing summary crime, it is proposed that the summary sheriff will have jurisdiction to hear housing actions, family actions, appeals and referrals from children's hearings, urgent motions for interim orders in ordinary actions and actions with a value of £5,000 or less, i.e. all small claims and summary causes. Whilst the majority of small claims and summary causes would not be categorised as "complex civil cases", practitioners will vouch for the fact that it is not uncommon for a small claim to land on their desk which is complex and time-consuming, despite its low value.³ One such case landed on the author's desk a week before it was due to proceed to proof. The case settled on the morning of proof, but this short note considers the legal issues which would have arisen had the case proceeded and speculates on the arguments which each party might have advanced. It also briefly considers where appeals from the sheriff court will lie under the new proposals.

A. THE FACTS

The pursuers, the parents of a nine-year-old child, raised an action for recovery of the costs they incurred in replacing the child's bike which, according to the summons, the child left lying at the end of their driveway and which their neighbour had driven over while exiting his. The defender denied liability and averred that the child had in fact left the bike at the bottom of the defender's driveway, which prevented him from seeing it before he entered his car. In those circumstances, he averred, the pursuers had failed in their duty to supervise their child and so he counterclaimed for the cost of repairing the damage to the underside of his vehicle. The pursuers' claim was

1 Scottish Government, *Making Justice Work - Courts Reform (Scotland) Bill - A Consultation paper* (2013) para 55.

2 The consultation process has ended and it is expected that the Bill will be placed before Parliament in early 2014.

3 And correspondingly low fee for the solicitors involved.

worth £135; the defender's just short of £1,500. Despite the low value of the claims, the case raised a number of interesting legal points.

As the small claims procedure in Scotland does not allow for debates or proofs before answer, there is no mechanism for parties to move for a plea to the relevancy to be sustained. The only option, in the absence of a motion made at an early stage of the proceedings to have the claim remitted to ordinary cause procedure,⁴ is to advance such an argument during closing submissions.⁵ In the case under discussion, there were relevancy issues at play in both the principal action and in the counterclaim. Some of the arguments which may have been advanced by the parties are worthy of consideration.

B. THE RELEVANCY ISSUES

At the close of the proof, it would have been open to the pursuers to move the court to dismiss the counterclaim as being irrelevant in law. They could have argued that they had no legal duty to supervise where their child left his bike, relying on *Donaldson v McNiven*⁶ in which the court held that the defendant (the father of a thirteen-year-old boy) was not liable when his son injured the plaintiff with an air rifle as appropriate instructions had been given by the father. They might also have referred to *Harris v Perry*⁷ in which the Court of Appeal held that the defendants (the parents of a boy hosting a bouncy castle party in their garden) had not failed in their duty to supervise the child guests when a boy on the bouncy castle executed a summersault that caused serious brain injury to the claimant. Presumably they would also have submitted that if they did not owe a duty to supervise they could not be liable to the defender, as parents are not liable for the delicts of their children.⁸

The defender, in support of his contention that he was owed a duty of care by the pursuers, might have relied upon a series of English cases in which the courts have held that, in particular circumstances, parents owe a duty to supervise their children. In *Newton v Edgerley*⁹ the father of a twelve-year-old boy was held liable for injuries sustained by the plaintiff when the defendant's son accidentally shot the plaintiff in the leg with a gun the father had allowed his son to purchase. The court held that the defendant had failed to give his son adequate instructions on how to use the gun and, given that the defendant must have known the dangers a gun would pose in the hands of someone not properly trained in its use, held that he had failed to take reasonable care. In *Carmarthenshire County Council v Lewis*¹⁰ the House of Lords held that the council, which was responsible for running a nursery school, was liable to the widow of a man killed in a road traffic accident as a result of being forced to swerve his car

4 Small Claims Rules 2002, rule 15.2.

5 Ibid. A party *could* try to raise a plea to the relevancy at the preliminary hearing and seek decree of dismissal. However, in the author's experience, that is uncommon, unless the action is patently irrelevant.

6 [1932] 2 All ER 691.

7 [2009] 1 WLR 19.

8 Unless the parent had engaged the child as an agent or servant, see D M Walker, *The Law of Delict in Scotland*, 2nd edn (1982) 86.

9 [1959] 1 WLR 1031.

10 [1959] AC 549.

to avoid hitting a four-year-old child who had absconded from his nursery class and run onto the road. The court held that a child of that age was too unpredictable to be left alone and that the council had failed in its duty to supervise.

Had the sheriff been minded to dismiss the counterclaim as irrelevant, one can envisage the defender advancing an argument that the principal action was also irrelevant on the basis that the pursuers, having gifted the bike to their child, were no longer its owners. In these circumstances, the defender might have submitted that the pursuers' action was one for recovery of a negligently-inflicted purely economic loss and therefore irrelevant in Scots law.¹¹ Equally, it would then have been open to the pursuers to argue either that they retained ownership of the bike and were thus entitled to sue or, in the event that this was properly a case of pure economic loss, that it was fair, just and reasonable in the circumstances for the court to impose a duty¹² on the defender to take reasonable care not to damage the child's bike and so cause the pursuers financial loss.

Of course, the pursuers could have raised the action in the name of their son. This could have been done at the outset of the claim, or by motion to amend the designation of the summons at the bar, and would have ensured that the principal action was relevant in law. However, it would also have ensured the relevance of the counterclaim and the pursuers might effectively have denied themselves the opportunity of arguing that it should be dismissed. Accordingly, rather than proceed in a way which would have guaranteed the counterclaim's survival, the pursuers might have preferred to proceed on the basis of the case as pled and accept the risk of their own action being dismissed after proof.

C. COMMENT

Had the parties' submissions proceeded on the bases envisaged above, both actions may well have been dismissed. Having regard to the counterclaim, the authorities make clear that the level of supervision required will vary according to the age and maturity of the child, the activity the child is undertaking and the chances that the activity could cause another person to suffer loss, injury or damage. It is suggested that a nine-year-old in charge of his bike in the immediate vicinity of his driveway without supervision is not analogous to a twelve-year-old operating a gun without prior instruction or supervision. In the latter, the chance of harm occurring to others is both real and obvious; in the former, the chance of harm may be said to be slim. If the parents are not under a duty to supervise, they cannot be liable for their child's actions. Turning to the principal action, it is suggested that the sheriff is likely to have found the child to be the owner of the bike and to have ruled that the parents' action

11 See *Nacap Ltd v Moffat Plant Ltd* 1987 SLT 221. In that case the pursuer company who had contracted to make good damage to property in its possession, but who were not the owners of the property, were deemed not to have title to sue for recovery of the costs incurred in repairing the damage.

12 *Caparo Industries plc v Dickman* [1990] 2 AC 605. The pursuers might have sought to reinforce this argument by referring to the absence of any possibility of indeterminate liability to an indeterminate class being imposed upon the defender.

was, therefore, one for recovery of a negligently-inflicted purely economic loss and that there was no reason to depart from the rule against such recoveries.

This is, of course, hypothetical as the case settled. However, had it proceeded to proof and had the sheriff held one of the actions to be relevant and the other irrelevant, the unsuccessful party's advisers may have recommended appealing the decision given the questions of law which had arisen.

The Courts Reform (Scotland) Bill proposes changes to the appeals procedure in the sheriff court. Appeals under the small claims procedure have always been restricted to an appeal to the sheriff principal.¹³ There is no right of appeal to the Inner House as exists in ordinary actions. However, a small claim may be remitted to ordinary cause procedure. This option exists for cases which raise important principles of law, which would benefit from ordinary procedure, would merit the expenses of an ordinary action and from where an appeal to the Inner House and ultimately to the Supreme Court are available as options. This option could have been considered in the bike case had it proceeded.

At present, the appellant in an ordinary action can choose to leapfrog the sheriff principal and proceed directly to the Inner House. However, the Courts Reform (Scotland) Bill, in its current form, removes that choice: the Bill proposes that any appeal from the sheriff lies only to the newly created Sheriff Appeal Court. A further right of appeal will exist from the Sheriff Appeal Court to the Inner House but only with leave of the Appeal Court or leave of the Inner House itself.¹⁴

D. CONCLUSION

In response to the government's consultation on the proposed court reforms, the Faculty of Advocates expressed concern about the "very restricted circumstances" in which parties can appeal to the Inner House.¹⁵ In addition, the Westwater Advocates Personal Injury Group posed the following question: "would *Donoghue v Stevenson* ever have been a case considered to have been exceptional enough to have reached the Inner House?"¹⁶ In the author's experience there is frequently no correlation between the sum sued for and the importance or complexity of the legal issues arising, as the bike case demonstrates. It is, therefore, to be hoped that, if the reforms proceed as drafted, claims of low value, which nonetheless raise novel and complex issues of law, will not be prevented from reaching Scotland's Supreme Court.

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(The author is grateful to Greg Gordon and James Campbell for commenting on earlier drafts)

¹³ Small Claims Rules 2002 ch 23.

¹⁴ Courts Reform (Scotland) Bill ss 88-93.

¹⁵ Response of the Faculty of Advocates to the consultation paper, available at http://www.advocates.org.uk/downloads/news/responses/20130604_courts.pdf.

¹⁶ See <http://www.westwateradvocates.com/our-response-to-the-courts-reform-scotland-bill>.